(18,941)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 43.

MARIA F. THOMAS AND GEORGE FOLSOM,

APPELLANTS,

vs.

THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY,

APPELLEE.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY, APPELLEE.

The bill does sufficiently show that the Board of Trustees of the Ohio State University is a corporation of the State of Ohio, within the rule that a suit by or against a corporation in a court of the United States is conclusively presumed, for the purposes of litigation, to be one by or against citizens of the state creating the corporation.

Whether or not the Board is a corporation for the purpose of determining its citizenship and the jurisdiction of the court, is a question to be passed upon by the Federal Court under its own rules of decision and the doctrines of the common law. It is not controlled in that regard by any decision of the Supreme Court of Ohio as to the character of the Institution for certain purposes of the State.

Nor does it matter by what name the body may be designated. Its real nature is alone to be looked at.

A State statute or decision could not confer jurisdiction on the Federal Courts by calling an association a corporation, when it has not the characteristics of one. Nor could it deprive it of jurisdiction by declaring that an Institution, having all the attributes of a corporation, is not one. Why should the name determine the citizenship?

"The real character of an association does not depend upon the name by which it is called.

"For this reason it was decided by the Supreme Courts of the United States and of the State of Massachusetts that a company formed in England under acts of Parliament investing it with corporate franchises was a corporation within the meaning of a law enacted in Massachusetts, although the acts of Parliament expressly provided that they should not be construed to incorporate the company. The provision in the acts of Parliament declaring that they should not be construed to incorporate the company was contradictory to the other provisions, which actually did invest the company with the attributes of a corporation. The effect of this provision might perhaps be to alter the meaning of the word 'incorporate' in English law, but it did not change the real nature of the company. It certainly could not impose a rule for the construction of statutes passed by a foreign state."

1 *Morawetz on Corporations*, Sec. 18.

Citing: *Liverpool Insurance Company vs. Massachusetts*, 10 Wall., 566; *Same Case*, 100 Mass., 531; *Thomas vs. Dakin*, 22 Wend., 9, 103.

"A joint stock association, which by its deed of settlement in England and certain acts of Parliament is endowed with the faculties and powers mentioned below, is a corporation, and will be so held in this country, notwithstanding the acts of Parliament in accordance with a local policy declare that it shall not be so held.

"These faculties and powers are:

"1. A distinctive artifical name by which it can make contracts.

"2. A statutory authority to sue and be sued in the name of its officers as representing the association.

"3. A statutory recognition of the association as an entity distinct from its members, by allowing them to sue it and be sued by it.

"4. A provision for its perpetuity by transfers."

Liverpool Insurance Company v. Massachusetts, 10 Wall., 566.

Mr. Justice MILLER there says: "We have no hesitation in holding that, as the law of corporations is understood in this country, the Association is a Corporation."

The Board of Trustees has all the qualities possessed by corporations generally in this country.

It is a fictitious body created by law.

It has an entity aside from the persons constituting it.

The members of the Board are constituted an artificial person, and are united in one body with a succession of members without changing the identity of the body.

It has a corporate name and style.

It has a common seal.

It has perpetual succession.

Its property does not go to the heirs of the members as does the property of natural persons, but it passes to the successors in the Board as does property held in a corporate capacity.

Under its special name and style it has the faculties following:

It may sue and be sued.

It may contract and be contracted with.

It may receive and hold grants and devises of land.

It may receive and hold donations of money and other personal property.

These are all corporate functions and franchises; and the Board has all the distinguishing features of a corporation.

The claim of counsel for George Folsom, that the Board may not take title to property, is untenable. He relies upon Sec. 13 of the Act of March 22, 1870 (67 O. L., 22; Bates' Statutes, Sec. 4105-16), which provides that: "The title for all lands for the use of said college shall be made in fee simple to the State of Ohio, with covenants of seizin and general warranty;" and no title shall be taken to the State for the purposes aforesaid until the Attorney General shall be satisfied that the same is free from all defects and incumbrances.

Under the well established canons of construction, this general language must be restrained to the fitness of the matter. It applies only to lands to be used for college purposes. At most, it can only be extended to lands granted in consideration of the location of a college as provided in Sec. 17 of said act, or to lands purchased as provided in Sec. 16.

The general intention expressed in said Sec. 13 may not be permitted to overcome or nullify the particular intention expressed in the preceding Sec. 11. The Board cannot hold in trust any devise of land as it is empowered to do by the latter section, unless it can take title to such land. How else could it hold it?

Then it is absurd to speak of a *deed* of land, "with covenants of seisin and warranty." Such a thing was never heard or dreamed of. It would likewise be senseless to provide that *no gift* of land should be received without warranty and unless it was free from all defects and incumbrances. It might have great value nevertheless, and we may say "Such a gift have in the mouth."

Moreover, the act of April 5, 1872, (70 O. L., 108; Bates' Statutes, Sec. 4103-211, provides in Sec. 3 that the title of all lands ceded by Congress to the State was thereby vested in said trustees, and in Secs. 5 and 5 for making deeds therefor by said trustees. The act of March 19, 1889 (86 O. L., 90; Bates' Statutes, Sec. 4103-48), further provides for the making by said Board of conveyances as part of said lands.

Very clearly, therefore, said Board possesses the franchise of taking title to, and making conveyance of, real estate.

Corporations at common law have been defined as follows:

"Corporations, as conceived by the common law, were under no incapacity to hold or dispose of lands. A corporation, it may be explained, is a fictitious body invested by law with the attributes of a person, having a corporate name by which it can sue and be sued, and hold property, but enjoying immortal existence by reason of the perpetual succession of its members, as the corporation of London or Trinity College, Cambridge."

Williams on Real Property (17 Ed.), 79[1].

"A corporation was described by Chief Justice Woodward, in the Dartmouth College case, as 'an artificial being, invisible, intangible, and existing only in contemplation of law.' A corporation has also been designated a legal entity, a creature of the law, a legal institution, a fictitious or political person. These and similar definitions have received the approval of many eminent authorities."

1 Morawetz on Corporations, Sec. 1.

In *Thomas v. Dakin*, 22 Wend., 9, 101, 102, COWEN, J., says: "From their *having perpetual succession*, and *suing and being sued* in their political character, single persons of both these descriptions have been uniformly, in the books of English law, called corporations. *Kyd* on *Corp.*, 19, 20. A sole corporation, as its name implies, consists only of one person, to whom and his successors belongs that legal perpetuity, the enjoyment of which is denied to all natural persons. *Angel & Ames on Corp.*, 18, 19. 1 *Black. Comm.*, 469. * * The grand test of a corporation is the mode in which property succeeds from one to another. When it does not go to the heirs of the holder as a natural person, it passes to the successor or successors, because it is holden in a corporate capacity. The holders are therefore said to be a person or body politic and corporate, in opposition to their natural capacity. * *

"It has been impossible for me to see the force of the argument that, because the legislature have constantly avoided to call these associations, or any of their machinery, a *corporation*, therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the legislature expressly declare each of them to be corporations, without giving them corporate successions, or other artificial attributes, the declaration would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations, would not change their character, provided they should in fact be clothed with all the essential powers of corporations. Suppose the legislature should attempt to create an ordinary safety fund bank, with its usual machinery, by a majority vote; could the bank thus created maintain its ground, merely because the statute might, in conclusion, declare that such bank should not be called or known as a corporation? The restrictive provision in the constitution was leveled at the *thing*, not the *name;* at that species of legal

being already known to the law as a corporation, not what the legislature might call so."

. . . . . .

"*A corporation is a legal institution*, devised to confer, upon the individuals of which it is composed, powers, privileges and immunities which they would not otherwise possess, the most important of which are continuous legal identity or unity and perpetual or indefinite succession, under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members. It conveys, perhaps, as intelligible an idea as can be given by a brief definition to say that a corporation is a *legal person*, perfectly distinct from the members which compose it, having a special name, and having such powers, and such only, as the law prescribes."

1 *Dillon Mun. Corp.* (4th Ed.), Sec. 18.

While the amendment to the bill does not expressly allege that the Board of Trustees is a corporation, still it states *facts*, which show that it is one. Moreover, the court will take judicial notice of the statutes of Ohio creating said Board and of the attributes thereby conferred.

"An act to establish and maintain an Agricultural and Mechanical College in Ohio," passed March 22, 1870, (67 Ohio Laws, 20), provides in Secs. 4 and 9, (Bates' Statutes, Secs. 4105-10 and 14):

"Sec. 4. The trustees *and their successors in office* shall be styled the 'Board of Trustees of the Ohio Agricultural and Mechanical College,' with the right as such of suing and being sued, of contracting and being contracted with, of making and using a common seal, and altering the same at pleasure."

"Sec. 9. The Board of Trustees shall annually elect one of their number chairman, and, in the absence of the chairman, shall elect one of their number temporary chairman, and shall have power to appoint a secretary, treasurer and librarian, and such other officers as the interests of the college may require, who may or may not be members of the

board; and shall hold their offices for such term as said board shall fix, subject to removal by said board, and shall receive such compensation as the board shall prescribe."

"An Act to reorganize and change the name of the Ohio Agricultural and Mechanical College, and to repeal certain acts therein named" passed May 1, 1878, (75 Ohio Laws, 126), provides in Secs. 1 and 6, (Bates' Statutes, Secs. 4105-36 and 41):

"Section 1. That the educational institution heretofore designated as the Ohio Agricultural and Mechanical College shall be known and designated hereafter as 'The Ohio State University.'"

"Section 6. The first meeting of the members of the board shall be called by the Governor, as soon after the appointment of said board as convenient, to be held at said university, in Columbus, Ohio. All succeeding meetings shall be called in such a manner, and at such times as the board may prescribe. The said board shall meet at least three times annually, and at such other times as they may think necessary for the best interest of the said university. A majority of the Board of Trustees present at any meeting shall constitute a quorum to do business: provided, a majority of all the board shall be required to elect or remove a president or professor."

Said statutes also clothe the Board of Trustees with the other faculties and powers specified in the amendment to the bill of the complainant.

"The condition" under the amendment to the bill is not, (as is contended by opposing counsel), "the same as was presented to the Supreme Court of the United States in the *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S., 499." Far from it. In the latter case the court held that Jones & Laughlins, Limited, was a partnership association, although it had some of the characteristics of a corporation. It also had characteristics of a partnership, and was in fact a part-

nership. The court say that they are unwilling to extend the jurisdictional rule as to corporations so as to embrace partnership associations.

If this court had been of opinion, in regard to the real nature of such associations as Jones & Laughlins, Limited, that they possessed every attribute deemed essential to the existence of a corporation, and held no other, it would, we submit, have held that they were corporations within the jurisdictional rule, although the Supreme Court of Pennsylvania had decided that they were not technically corporations, and the act creating them did not declare them to be corporations nor style them as such.

Now, the Board of Trustees of the Ohio State University has in the fullest measure the attributes of a corporation, and it has no quality that is not characteristic of one.

The jurisdictional rule in the Federal Courts extends to all corporations, public as well as private; *Cowles v. Mercer Co.*, 7 Wall., 118; *City of Ysleta v. Canda*, 67 Fed. Rep., 6. Nor does it matter, how the corporation is created, managed or terminated.

Counsel for appellants in their brief point out and insist that the Board of Trustees does not have all the powers and functions conferred by the Statutes of Ohio upon *private corporations for profit* in that State. This, we submit, is immaterial. In Ohio, as well as elsewhere, there are many dissimilar classes of corporations, public and private, municipal, educational, charitable and religious corporations, and business corporations having a capital stock. These different kinds of corporations vary greatly in their constitutions, powers, franchises and features; but they are all corporations for the purpose of jurisdiction.

THE BILL DOES ALSO SUFFICIENTLY SHOW THAT THE PERSONS CONSTITUTING THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY WHEN THE BILL WAS FILED WERE IN FACT CITIZENS OF OHIO, AND THAT THE REQUISITE DIVERSITY OF CITIZENSHIP EXISTED TO GIVE JURISDICTION TO THE CIRCUIT COURT.

Whether the Board of Trustees be a Corporation or not, still the controversy is between Citizens of different States.

The Constitution of the State of Ohio provides in Sec. 4, Art. XV., that: "No person shall be elected or appointed to any office in this State, unless he possess the qualifications of an elector," and by Sec. 1, Art. V., defines the qualifications of an elector, who must be a citizen of that State. He must be a citizen of the United States and a resident of Ohio for at least one year. "A citizen of the United States, residing in any State of the Union, is a citizen of that State." *Gassies v. Ballon*, 6 Pet., 761; *Boyd v. Nebraska*, 143 U. S., 135. In *Lehman v. McBride*, 15 Ohio St., 600, SCOTT, J., says: "Without entering into a labored disquisition upon the import of the word 'resident' and 'residence,' it may be safely assumed that, in the proper interpretation of the Constitution, the word *residence* may be regarded as synonymous with *home;* and that to reside in a particular place, means to have one's *home* there. Such has long been its popular sense, and it is so used in statutes of the State passed before the adoption of the present Constitution. * * * * We concede, then, that the Constitution makes the 'residence' the 'fixed habitation' or 'home,' of the voter, an essential part of his qualifications as an elector."

The members of the Board of Trustees are *officers* appointed in the State of Ohio.

The Constitution of this State in Sec. 2, Art. VII., provides: "The Trustees of the benevolent and other State institutions, now elected by the General Assembly and all such other State institutions as may be hereafter created, shall be appointed by the Governor by and with the advice and consent of the Senate." In *State v. Wilson*, 29 Ohio St., 349, the court say: "The only *officers* named in the Constitution in connection with these institutions *are the trustees*. Art. VII., Sec. 2."

The above mentioned statute of Ohio, passed May 1, 1878 (75 O. L., 126; Bates' Stats., Secs. 4105-37 and 38), provides in Secs. 2 and 3 that: "The government of said University shall be vested in a Board of seven Trustees, who shall be appointed by the Governor of the State, with the advice and consent of the Senate. * * The members of said Board of Trustees, and their successors, shall hold their *offices* for the term of seven years each."

In *State v. Wilson, supra*, it was held that the place of Medical Superintendent of a Hospital for the Insane is an "office" within the meaning of said Sec. 4, Art. XV., of the Constitution. In *State ex rel. v. Rust*, 4 Ohio Circuit Ct. Rep., 329, it was held that the members of a Board of Work House Directors were officers within the meaning of said Section. And in *State ex rel v. Adams*, 58 Ohio St., 603, it was held that Notaries Public were such officers.

"Emolument is a usual but not a necessary element to constitute an office. Authority and power relating to the public interests, conferred by statute, and which may be vested in a board of individuals by election or the appointing power of

the State, create an office. Whatever less than this may create an office, it is unnecessary to determine."

State ex rel. v. Kennon, 7 Ohio St., 547.

The Circuit Court of the United States, as well as this court on appeal or error from that court, takes judicial notice of the laws and judicial decisions of every State of the Union.

Pennington v. Gibson, 16 How., 65.
Lamar v. Picou, 114 U. S., 218.
Hanley v. Donoghue, 116 U. S., 1.
Fourth Nat. Bank v. Francklyn, 120 U. S., 747.

The statutes above referred to affect the public, and are public laws. They do not relate to private matters which do not concern the public at large.

All things are presumed to be rightly done until the contrary is proven.

"It is a well settled general rule that where a person assumes to act in the capacity of a public officer, his appointment and *qualification* for the office will be presumed."

22 A. & E. Ency. of Law (2d Ed.), 1266.

"The general presumption is that public officers perform their official duty and that their official acts are regular; and where some preceding act or *pre-existing fact* is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or pre-existing fact."

Ibid., 1267.

"This presumption of the performance," (of their duty), "applies to all classes of public officers, such as * * Governors."

Ibid., 1270.

"And that official" (the Governor) "will be presumed to have done and to intend to do his duty."

14 *A. & E. Ency of Law* (2d Ed.), 1099.

"In the absence of proof, the legal presumption is that the supreme executive power of Mexico caused to be published and circulated its laws and general Constitution, as required by such Constitution."

Hayes v. United States, 170 U. S., 637, (42 L. Ed., 1174.)

In *Nofire v. United States*, 164 U. S., 660, *Mr. Justice* BREWER says: "The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact. *Bank of United States v. Dandridge*, 12 Wheat., 64, 70; *Rankin v. Hoyt*, 4 How., 327; *Butler v. Maples*, 9 Wall., 766; *Weyauwega v. Ayling*, 99 U. S., 112; *Gonzales v. Ross*, 120 U. S., 605; *Callaghan v. Myers*, 128 U. S., 138; *Keyser v. Hitz*, 133 U. S., 138; *Knox County v. Ninth Nat. Bank*, 147 U. S., 91, 97. In this last case it is said: 'It is a rule of very general application that where an act is done which can be done legally only after the performance of some prior act proof of the later carries with it a presumption of the due performance of the prior act.' "

The Governor could not have regularly or legally appointed as a member of said Board any person who was not a citizen of Ohio. It was the duty of the Senate to have refused to confirm the appointment of anyone not having that qualification. The presumption is that the Governor and the Senate performed their respective duties, and that the members of the Board are citizens of Ohio. It must be held that such members have the requisite qualifications for their offices until the contrary shall be shown.

This presumption is confirmed by the allegation of the

complainant that said Board is "a citizen of and domiciled in the State of Ohio," and is "fully authorized and empowered" to exercise its functions.

After the amendment to the bill setting up further jurisdictional facts, no objection to the jurisdiction was made by plea in abatement or otherwise. Before the court can now hold that there was want of jurisdiction in the Circuit Court, it must be *legally certain* of that fact. In *Deputron v. Young*, 134 U. S., 241, 252, *Mr. Chief Justice* FULLER says: "In *Barry v. Edmunds*, 116 U. S., 550, it was held that a suit cannot properly be dismissed by a Circuit Court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record create a legal certainty of that conclusion. 'Nothing less than this,' said *Mr. Justice* MATTHEWS, 'is meant by the Statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of the said Circuit Court.' "

If the defendant had by pleading objected to the jurisdiction, the burden of showing that there was not a diversity of citizenship would have rested upon it; *Adams v. Shirk*, 117 Fed. Rep., 801, (Circuit Court of Appeals, Seventh Circuit, 1902.)

The Board of Trustees of the Ohio State University is an artificial body created by the laws of the State of Ohio, and composed wholly of members who are citizens of that State. It is by the law of its creation endowed with the faculty of suing and being sued under that name and style. Under such circumstances, and for the purposes of federal jurisdiction, the citizenship of its constituent members is imputable to the organization. Its members are all jointly concerned in the litigation and in the results thereof. They have no

separate or individual rights or interests in the controversy. All the individuals constituting the Board, in case the complainant had any cause of action against them, were competent to be sued by her in the United States Court.

A corporation is not, strictly speaking, a citizen. But for the purposes of suing and being sued in the Federal Courts, it is treated as a citizen of the State, under whose laws it was created.

In the *Board of Supervisors of Mercer Co. v. Cowles*, 7 Wall., 118, *Mr. Chief Justice* CHASE said: "It has never been doubted that a corporation, all the members of which reside in the State creating it, is liable to suit upon its contracts by the citizens of other States, but it was for many years much controverted whether an allegation in a declaration that a corporation defendant was incorporated by a State other than that of the plaintiff, and established within its limits, was sufficient averment of jurisdiction." * * *

"In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution."

In the *Bank of the United States v. Deveaux*, 5 Cranch, 87, MARSHALL, C. J., said: "That name," (the corporate name), "indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals."

In *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S., 545, 562, *Mr. Justice* SHIRAS, after reviewing the cases which establish the rule that State corporations are indisputably composed of citizens of the States creating them, says: "To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal Courts in "controversies between citizens of different states."

The only difference, for the purposes of federal jurisdiction, between a corporation and an unincorporated association or body created by the State is that in the case of the former there is a conclusive legal presumption that the organization is composed of citizens of the State creating it, while in the latter case no such fiction obtains. In the latter case, it is a disputable question of fact. But the fact being established that all the constituent members of the body are citizens of the State creating it, then the reasons for imputing to the organization the citizenship of its constituent members, and treating the body as a citizen of such State for the purpose of suing and being sued in the Courts of the Union, apply quite as forcibly to such institution as they do to a technical corporation.

Following the language of the foregoing quotations, the controversy is in fact and in law between the persons sued in their associate character, by their associate name, because of

a right claimed by the association, and the individual by whom the suit was instituted. Substantially and essentially, the parties come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. The organzed body, composed of citizens of the State creating it, is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal Courts in "controversies between citizens of different States." In the case before the court, the members of the association are all citizens of Ohio, and the organization is liable to suit within the narrowest construction of the Constitution.

IF THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY IS NOT SUCH A CORPORATION AS IS REQUIRED BY THE JURISDICTIONAL RULE IN THE FEDERAL COURTS, NEVERTHELESS THE SUIT MIGHT BE MAINTAINED AGAINST IT AS "THE BOARD OF TRUSTEES OF THE OHIO STATE UNIVERSITY" WITHOUT BRINGING THE PERSONS CONSTITUTING THE BOARD BEFORE THE COURT AS DEFENDANTS.

The Board was Properly Sued under the Statutory Designation.

It is clearly within the power of the State to create new artificial persons, who are not corporations, and to invest such legal institutions or *quasi* corporations with the right, *under a given name and style*, to receive, hold and convey real and personal property, to contract and be contracted with, and to sue and be sued. These capacities will be allowed, acknowledged and regarded, and these new rights will be enforced by the Federal Courts in suits in equity within their jurisdiction. There is no reason why they should not. There is no good reason that a corporation should have capacity to sue and be sued under a certain name in such courts, and that a *quasi* corporation should not, when the same locality is conferred upon such by the statutes creating them. This proposition does not involve any question in regard to conclusive presumptions or fictions. For its maintenance, it is not essential to extend to such *quasi* corporations for the purpose of jurisdiction the rule applicable to an actual corporation that it is to be deemed a citizen of the State creating it.

without reference to the citizenship of the natural persons composing it.

Of course, such unincorporated body cannot sue or be sued under its association name, or any other name or names, in the Federal Courts unless the requisite diversity of citizenship exists. But, if the controversy is substantially and essentially between citizens of different States, then it may sue or be sued in the United States Courts under the names authorized by the State statutes.

"In the absence of any provision of law, or rule prescribed by the Supreme Court, the Federal Courts exercise their discretion as to following the practice of the State equity courts within the limits where questions arise."

Dupree v. Thomson-Houston Electric Co., 66 Fed. Rep., 55.

"Federal Courts may enforce, on their equity or admiralty side, such rights or privileges conferred by State or Territorial statutes, as they may enforce new rights of action, given by statute, upon their common law side."

Cowley v. Northern Pacific R. Co., 159 U. S., 569.

The Board of Trustees of the Ohio State University is a very different thing from a partnership. In a partnership the members are personally interested in its property and contracts and litigation. They own its assets, and are personally liable for its debts and obligations. Judgments against the partnership in the partnership name may, by proceedings at law or in equity, be enforced against the property of the partners. But the members of said Board of Trustees have no personal interest in its property or contracts, and are not personally liable for its obligations. There may be reasons for making the members of a partnership parties to a

suit against it, which cannot exist for making members of the board parties to a suit against it.

In the present case, the bill of complaint of the plaintiff sets forth instruments purporting to vest the title to the premises in controversy in said Board of Trustees, and she seeks to have her title quieted against the claim of said board. No doubt, courts of equity have power to grant relief in such cases. May not the Federal Court grant it at the suit of a citizen of Michigan? Yet it seems to be equitable and essential that the artificial person, in whom and in whose name the disputed title is vested, should be a party defendant to such suit. There is no title to be quieted in the individual members of the board. They could not convey or quit-claim, except as one body and in the name of the board.

But, even in the case of a partnership, we submit, it may, where the State statute authorizes it to be sued in the partnership name without joining the individual members of the firm, be so sued in the Federal Courts when it appears that all such members are citizens of a different State from the plaintiff.

Nothing to the contrary is decided in the case of *Chapman v. Barney*, 129 U. S., 677, or in the case of *Hotel Co. v. Jones*, 177 U. S., 449. In the former case *Mr. Justice* LAMAR, speaking of the United States Express Co., which was a partnership, said: "Although it may be authorized by the laws of the State of New York to bring a suit in the name of its president, that fact cannot give the company power, by that name, to sue in the Federal Courts." This remark must be taken with reference to the case then before the Court. The suit was brought in Illinois against a citizen of that State. The question was whether or not the fact that the Express Company was organized under a law of New York and was

authorized by such law to bring suit in the name of its president, implied that all the members of the company were citizens of that State. The holding was that such presumption would not arise unless the company was a corporation, and the fact, that it was authorized by the laws of New York under which it was organized to bring suit in the name of its president, did not constitute it a corporation, and therefore that fact did not empower it to bring such suit in the Federal Court of Illinois against a citizen of that State. The court did not decide that, in case the record had disclosed that all the members of the company were citizens of New York, then the Express Company might not have brought such suit in the name of its president in the Federal Court. No such question arose.

The scope of the above quoted observation is indicated by the next following statement of the Justice, who proceeds to say: "The company may have been organized under the laws of New York and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company. They are not shown to be citizens of some State other than Illinois." It may be inferred that, if the record had shown that all the members were citizens of New York, then the court would not have held that the record did not show a case of which the Circuit Court could take jurisdiction.

If an unincorporated joint stock company, or *quasi* corporation, cannot be a citizen of a State, so likewise a corporation, as the Supreme Court has repeatedly remarked, cannot be a citizen of a State. But, in either case, the citizenship of its component parts may be imputed to the organized body, and such organization may, for the purposes of

jurisdiction and because the controversy is substantially and practically between citizens of different States, be treated as such citizen. In the one case this result is brought about by a fiction, and in the other without it.

In the case of *Hotel Co. v. Jones*, 177 U. S., 449, the suit was brought in Ohio against a citizen of Ohio and others by a limited partnership association organized under the laws of Pennsylvania and authorized thereby to sue and be sued by a firm name. *Mr. Justice* HARLAN, in delivering the opinion, says, p. 255: "It has been suggested that the plaintiffs are entitled to sue, and be sued, by their association name. * * But the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a Court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation. * * When the question relates to the jurisdiction of a Circuit Court of the United States as resting on the diverse citizenship of the parties, we must look, in the case of a suit by or against a partnership association, to the citizenship of the several persons composing such association."

Thereupon the court remanded the cause with directions that "the plaintiffs should be allowed, upon application, to amend the bill upon the subject of the citizenship of the parties." It is not intimated in this case that the suit could not be brought in the firm name in case the record showed requisite diversity of citizenship of all the partners.

The case of *Chapman v. Barney* was also remanded for further proceedings. This must refer to an amendment of the bill upon the subject of citizenship. Neither in that case nor in the Hotel Co. case was the bill ordered to be dismissed for want of jurisdiction.

If the Suit was not Instituted in proper form, still it might be maintained in such defective form unless the Defendant objected thereto on that ground.

The learned counsel for George Folsom, in his brief, said: "In actions brought against the board of trustees of a State institution the individuals should be sued as members of such boards. That was the *proper* mode of procedure in this case, if Federal jurisdiction was to be invoked." Let us, for the sake of the argument, concede this.

If the individual members of the board should have been named in the bill, then the suit was not commenced *in proper form*. But who can complain of such lack of formality? No one except the board or its members. No one else is affected thereby. Neither it nor they complained of such defect; and it was thereby waived. Without objection, they appeared and filed a general demurrer to the bill. The board could act only through its members, and its appearance was by them.

The suit against the Board of Trustees of the Ohio State University by that name was substantially a suit against the members of the Board. If regularly the Board should have been differently named in the bill, as for instance by the individual names of its members, it was only a case of misnomer, and the defendant waived the irregularity.

The individual members of the Board would have been mere *formal* parties. They had no individual or personal interest in the subject matter of the suit, and there could be no decree against them individually or personally. Their absence would not invalidate the decree.

Surely, where the plaintiff for some reason of her own

adopts an improper form of procedure, and the litigation after a hearing upon the merits terminates unfavorably to her, she cannot afterward upon an appeal procure a reversal of the judgment on the ground that she did not properly or rightly commence her suit. She cannot complain of her own fault. Her only remedy was to amend her bill.

In case of a defect of parties defendant, the plaintiff could not have the judgment reversed on that ground. Indeed, the plaintiff cannot at any stage of the proceedings object that there is a want of parties. He may waive his rights, if he has any, as to absent parties. Even a defendant cannot object for a defect of parties except in compliance with the 52nd and 53rd equity rules.

"In an action by a husband for the alleged negligent killing of his wife, an objection that plaintiff has no legal capacity to sue will not be considered on appeal, where the objection is then made for the first time."

St. Louis S. W. Ry. Co. v. Henson, 58 Fed. Rep., 531, (Court of Appeals, 8th Circuit. 1893.)

"A defect of parties plaintiffs or defendants through misjoinder or non-joinder is waived by a failure to suggest the same by demurrer or answer."

Tootle v. Coleman, 107 Fed. Rep., 41, (Court of App., 8th Circuit. 1901).

"It is too late to take, for the first time, an objection of non-joinder of a party, at the hearing, if a decree can be made between the parties before the court, without affecting the interests of those not before the court."

Story v. Livingston, 13 Peters, 359.

"A formal objection of want of parties cannot avail the party making it, when made for the first time in this court."

Carey v. Brown, 92 U. S., 171.

The matter of form does not concern the court, or affect its jurisdiction. If the controversy was substantially between citizens of different States, the Appellate Court will not hold that the Circuit Court was without jurisdiction because of any misnomer, or informality, or defect in the mode of procedure adopted by the complainant and not objected to by the respondent.

After decree the jurisdiction of the Circuit Court will be sustained, if it appears from the pleadings, process, evidence or any part of the record, or whether it is disclosed by direct statement, implication or presumption. Many objections to the jurisdiction, which might have been taken in the court below, are of no avail in the Appellate Court. Moreover, the complainant is estopped from raising any question about it.

"The case having been removed to the Federal Court upon the defendant's petition, it does not lie in its mouth to claim that that court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction."

Cowley v. Northern Pacific R. Co., 159 U. S., 569.

The same ruling was made in *Tootle v. Coleman*, 107 Fed. Rep., 41, (Ct. of App., 8th Circuit. 1901).

Respectfully submitted,

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